

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)**

UNITED STATES OF AMERICA,
ex rel. JON H. OBERG,

Plaintiff,

V.

NELNET, INC., *et al.*

Defendants.

Civil Action No.: 1:07-cv-00960-CMH-JFA

**DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO FILE EXHIBITS UNDER SEAL**

COME NOW Defendants Nelnet, Inc., Nelnet Education Loan Funding, Inc., Panhandle Plains Higher Education Authority, Inc., Panhandle Plains Management and Servicing Corporation, SLM Corporation, Southwest Student Services Corporation, Education Loans, Inc., Student Loan Finance Corporation, Brazos Higher Education Authority, and Brazos Higher Education Service Corporation (collectively, the “Defendants”), by counsel, and file this Memorandum in Support of their Motion for Leave to File Exhibits Under Seal, as follows:

On June 11, 2010, this Honorable Court entered an order that allowed the parties to file certain exhibits to their motions for summary judgment under seal temporarily. Parties and/or nonparties must file a motion to maintain such exhibits under seal no later than 5:00 p.m. on Friday, August 20, 2010. The exhibits filed with Defendants' memorandum today include documents provided by the New America Foundation ("NAF"), a nonparty to this litigation. The majority of these documents were previously filed under seal as exhibits to Defendants' Joint Statement of Undisputed Facts and are being included herewith solely for the convenience of the

Court. These documents are certain emails between Jon H. Oberg and an employee of NAF, whom NAF asserts is a journalist. Such exhibits have been identified as “Confidential”¹ by NAF, as NAF asserts they constitute a journalistic work product. In fact, despite producing such documents, NAF still asserts a journalistic privilege over these documents.

In *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir.2000), the Fourth Circuit identified the truism that a district court “has supervisory power over its own records and may, in its discretion, seal documents if the public’s right of access is outweighed by competing interests” (internal quotation marks omitted). In order to seal documents, the court must “(1) provide public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives.” *Id.*

The public notice requirement may be satisfied by docketing the motion to seal. See *Harrell v. Duke University Health System, Inc.*, 2007 WL 4460429, 1 (D.S.C. 2007). In this case, there are no adequate, less drastic alternatives to filing these exhibits under a temporary seal. Where a document is subject to a protective order but is material to the litigation, a court has the discretion to permit the document to be filed under seal. See *Grady v. Jefferson County Bd. Of County Com’rs*, 2008 WL 619219, 3 (D.Colo. 2008) (“the existence of a protective order, together with [enforcement of the protective] order, would likely supply the ‘compelling reason’ sufficient to support the filing of a document under seal, at least in the first instance.”); *DAG Enterprises v. Exxon Mobile Corp.*, 2005 WL 475274, 3 (D.D.C. 2005) (granted defendants’

¹ While marked “Highly Confidential,” NAF and one of the Panhandle defendants agreed to designate most documents as “Confidential.”

motion to file documents under seal that were subject to a protective order but that were essential to defendants' opposition).

In this case, all documents which Defendants seek to file under seal are subject to a sealing requirement by virtue of this Court's Stipulation and Order Governing Confidential Information. Additionally, the documents are material to the issue of whether there was spoliation of documents by Relator in this case. Given the need to file documents under seal as directed by this Court's Order, the request to temporarily seal these documents so that one motion to seal exhibits attached to Defendants' Motion for Relief for Relator's Spoliation of Evidence and Defendants' Joint Statement of Undisputed Facts may be made, and the Court's need to consider the materials, granting the relief requested herein is appropriate.

WHEREFORE, Defendants respectfully request this Honorable Court to grant permission to file the Exhibits under seal, and for such other and further relief as justice may require.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing (NEF) to the following:

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